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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 713.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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STATEMENT OF THE CASE.

On June 2, 1924, by the enactment on that date of Section 1019 of the Revenue Act of 1924, it was for the first time provided that "upon the allowance of a credit or refund" of an income tax sach as was refunded to respondents on August 25, 1924, interest should in each case be paid thereon from the date of the original overpayment by the taxpayer. The sole question of importance in the present case is whether "the allowance of a * * * refund" to the respondents occurred before or after the enactment of the Revenue Act of 1924 on June 2, 1924.

The statement of facts on pages 5 to 7 of petitioner's brief is correct enough as far as it goes, but *is substantially incorrect and misleading in what it omits of the essential facts which were averred in the Commissioner's own answer in the Court below, admitted by our demurrer to that answer, and set forth in the Record at places now to be cited.*

On page 5 of his brief it states that the Commissioner, on May 19, 1924, signed a certain schedule and gave certain instructions to the Collector for the First District of Pennsylvania. It fails to state, however, that that schedule (Exhibit A, facing R. 10) as is apparent on its very face was not completed until June 30, 1924. It fails to state that those instructions to the Collector were that the $35,054.85 in the case of the respondent's taxpayer and the other similar amounts listed in column 4 of that schedule were only *over-assessments*, and were not yet known to be and were not yet listed as *overpayments*, or that columns 8, 9, 10, 11 and 12 of that schedule were not filled in or approved even in the first instance until the Collector executed his certificate on that schedule on June 30, 1924. It fails to state that the instructions to the Collector were that he should determine what part of the *over-assessments* represented mere remitting of outstanding unpaid and unsatisfied assessments, and what balances remained as actual *overpayments*. It fails to state that the instructions to the Collector were that he should then, after having ascertained what portions of the over-assessments represented over-payments, examine all accounts of each taxpayer for all other years and apply the over-payments, if any, against taxes due for other years. It fails to state that then, and not until then, he should enter the net balance in column 12 as the amount to be refunded, *and it fails to state that not until then for the first time did any officer or employe of the Bureau of Internal Revenue know what amount, if any, was to be refunded.* At the bottom of page 5 of the statement of facts in petitioner's brief reference is made to the collector preparing a new schedule of refunds (Exhibit B,

facing R. 10). But it fails to state, as shown on the face of that schedule, that it was not until August 12, 1924, that the schedule was transmitted to the Commissioner with the following certificate of the Deputy Commissioner endorsed thereon:

> "CERTIFICATE OF DEPUTY COMMISSIONER,
> Commissioner of Internal Revenue:
> The items listed in column 4 hereof have been found to be the refundable portions of over-assessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.
> Date, Aug. 12, 1924.
>
> J. G. BRIGHT,
> *Deputy Commissioner.*"

and that it was not until August 12, 1924, that the Commissioner for the first time allowed or authorized the payment of any *refund* in this case when on that date he signed the following authorization on that same schedule:

> "AUTHORIZATION OF COMMISSIONER
> To the Disbursing Clerk, Treasury Department:
> The items listed in column 4 hereof have been found to be the refundable portions of over-assessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore be made in the amounts shown in column 7.
> Date, Aug. 12, 1924.
>
> D. H. BLAIR,
> *Commissioner of Internal Revenue.*"

THE STATUTE.

Section 1019 of the Revenue Act of 1924 (43 Stat. 346) which was approved and took effect June 2, 1924, provides:

> "Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority,

or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

QUESTIONS PRESENTED.

The questions presented by this case are not in any way affected by Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 316), as erroneously suggested at pages 1 and 2 of the petition, but involve only Section 1019 of the Revenue Act of 1924 (43 Stat. 346).

Respondents, in their petition for mandamus, asked only that the Commissioner be required to compute interest according to the provisions of the Revenue Act of 1924, and alleged that certain action taken by the Commissioner subsequent to the effective date of that Act constituted an allowance of a refund within its meaning. The interpretation or application of the Act of 1921 is therefore entirely immaterial, the sole question on the merits being whether the Commissioner allowed the refund after the effective date of the Act of 1924, i.e., June 2, 1924 (Section 1104, 43 Stat. 353).

The questions should, therefore, be restated as follows:

I. *Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of Section 1019 of the Revenue Act of 1924?*

II. *What was the date of "allowance" of the refund to the respondents within the meaning of Section 1019 of the Revenue Act of 1924?*

ARGUMENT.

I. The question whether mandamus lies in this case is not before this Court because the granting of the writ by the two courts below is not set up in the petition as one of the "reasons for granting the petition;" but in any event under the decisions of this Court mandamus is a proper remedy in this case.

Even if there were any real question as to a writ of mandamus being appropriate in the present case, it is apparent that the question is not one of sufficiently general importance to be urged upon this court in a petition for a writ of certiorari, as has very obviously been recognized by the Solicitor General in his failure to refer to it in any way in any of his five "reasons for granting the petition" on pages 3 to 4 of his petition.

The question was fully argued in both of the two courts below and expressly considered in the opinion of the Court of Appeals (R. 18) to which reference is made.

If, however, this Court is for any reason further interested in this question we would respectively refer to its own decision in *Roberts v. United States ex. rel. Valentine*, 176 U. S. 221, which is a case so closely in point with the present case that it would seem controlling and conclusive to the effect that mandamus is here a proper remedy. In that case the Treasurer of the United States had refused to pay certain interest which under the Act of August 13, 1894, was directed to be paid to the holders of certain audit certificates which had been redeemed under the Act of June 16, 1880. The case was practically on all fours with the present case, in both cases the question being whether the relator was entitled to interest under the provisions of an act of Congress, in that case the Act of August 13, 1894, and in the present case Section 1019 of the Revenue Act of 1924. Both acts were mandatory in their terms and left no room for the exercise of discretion in any administrative officer as to whether or not interest should be paid. In affirming the judgment of the lower court that man-

or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

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damus should issue, this Court said at page 230 (italics ours):

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. *Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform.* But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. *If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.* Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.
>
> "In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

That mandamus lies in a case like this, see also:

Lane v. Hoglund, 244 U. S. 174;
Work v. McAlester Co., 262 U. S. 200;
Smith v. Jackson, 246 U. S. 389.

II. The refund of $35,054.85 to the respondents had not yet been allowed on June 2, 1924, and was not allowed prior to August 12, 1924.

(a) *Petitioner's brief is irrelevant or inaccurate almost in its entirety, and fails to substantiate a single argument or reason in support of the petition.*

The petitioner's argument on pages 12 to 14 of his brief is in the first place utterly beside the point for it rests upon Section 1324 (a) of the Revenue Act of 1921, whereas respondents' whole claim in this case is expressly based upon Section 1019 of the Revenue Act of 1924. An argument such as that of petitioner on pages 12 to 14 of his brief, which does not even refer to or discuss in any way the only statute upon which the case has been based from the outset and upon which it was decided by the two courts below, can be considered as little else than an outright confession of utter inability to question the correctness of the judgments below or the soundness of the opinion of the Court of Appeals.

But not only is the brief argument urged in support of the petition subject to the criticism indicated, but it is erroneous in its assumptions in its almost every paragraph. For example, beginning at middle of page 13 it is erroneously suggested to this Court that all acts by the Commissioner subsequent to May 19, 1924, were mere routine, that the fact that claimant is entitled to a refund or credit and the amount thereof was determined when the Commissioner signed the first schedule, and that whether the allowance is liquidated by credit or by cash the interest received is the same, *every one of which suggestions is absolutely erroneous and misleading*, and to sustain this assertion it is not necessary to go back of the record.

Exhibit A (facing R. 10) shows on its very face a third

alternative of abatement (in which case no interest whatever is allowed by any statute) which is entirely ignored in petitioner's argument. Exhibit A shows that if any part of the over-assessments listed in column 4 had been found by the Collector to be unpaid and unsatisfied the overpayment which was listed by the Collector in column 8 over a month later on June 30, 1924, would have been correspondingly reduced, and necessarily follows that the *amount* of the refund or credit was not and could not have been determined and fixed when the Commissioner signed the first schedule on May 19, 1924. Exhibit B (also facing R. 10) shows not only that it was not until August 12, 1924, that the Commissioner was advised by the certificate of the Deputy Commissioner of the *amount* to be refunded but it also shows that not until the Commissioner signed the authorization to the disbursing clerk on that schedule, which he did on August 12, 1924, could one cent or refund have been paid, and that if he had never signed that authorization the refund would not have been paid to this day. Is it not absurd therefore for the petitioner to attempt to urge upon this court that both of the courts below erred when they held that the refund was not allowed prior to August 12, 1924? The further statement at the very bottom of page 13 of petitioner's brief that whether the allowance was liquidated by cash or by credit the interest received is the same is obviously contrary to the express terms of Section 1019 of the Revenue Act of 1924 which expressly provides that in the case of a credit interest runs to an entirely different date than in the case of a refund.

The comment on page 14 of petitioner's brief that the Commissioner's erroneous practice "has always been followed" is of the same nature and equally misleading when it is remembered that no interest of any sort was ever provided for in the case of either refunds or credits until the passage of the Revenue Act of 1921 on November 23, 1921, and that it was several months after that date before the Commissioner's office had established any definite practice

ADDENDUM.

Since the printing of this brief we have been advised that substantially the same question on the merits was presented in Merchants Loan & Trust Company, *et al.*, v. Smietanka, Dist. Ct. N. D. Ill., E. D., No. 33920, and that after argument and submission on written briefs Judge Lindley decided just as in the present case that the refund was not allowed and that interest did not stop on the date when the Commissioner signed the first schedule of over-assessments for transmission to the Collector, and on July 15, 1925, judgment was entered for the plaintiffs for the full amount of interest claimed.

It thus appears that three federal courts have considered this question and, after submission in each case of written briefs, unanimously reached the same decision as in the present case, while we know of no case where any Court of the United States has reached a contrary decision.

on this point, so that this information so freely volunteered to the Court should be corrected to indicate that this practice had been followed only for about *two years prior* to the bringing of the present case!

It should also be noted that this case involves no real question of interpretation of a statute, but merely one of the application of the reasonably plain terms of the statute to a procedure created, not by the statute, but by the administrative officials and subject to complete change at any time by them. It was successfully contended by the respondents in both of the courts below that the very statement of the facts themselves led inevitably to the conclusion that the Commissioner did not allow the refund in this case at any time prior to August 12, 1924, and in order to avoid repetition or undue lengthening of the present brief it is submitted in the confidence that a mere reading of the additional facts stated on pages 2 and 3 of this brief is in itself a sufficiently convincing argument on this point.

In conclusion the petitioner's brief cites certain decisions of this Court as apparently in point in the present case but very carefully and studiously avoids in any way attempting to explain just how they are in point. We cannot refrain from the comment that this is for the very good reason that they cannot be so explained. No such difficulty, however, confronts us. We believe that it has already been shown that the petition should not be granted because there has not been advanced in its support a single argument or reason which can be sustained, but before concluding this answer we desire to bring also to the attention of this Court that—

(b) *The decision of this Court in Stotesbury v. United States, 146 U. S. 196, is directly in point and conclusive in the present case.*

In that case an almost exactly similar question arose under a former regulation which provided that where a claim for refund of an internal revenue tax exceeded $250 the Commissioner should, before it was finally decided, transmit the case to the Secretary of the Treasury for his con-

sideration and advisement, just as the present regulations (T. D. 3260, 23 Treas. Dec. Int. Rev. 963) require the Commissioner similarly to transmit it to the collector for his advice as to the state of the taxpayer's accounts. The question presented was whether the Commissioner's transmittal *to* the Secretary of his certificate "that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed" constituted final award or allowance by the Commissioner, and even though the Commissioner had already ascertained the amount *that had been paid* (which in the present case he did not ascertain until the Deputy Commissioner's certificate of August 12), and even though the Commissioner had certified that the *refunding* had been *allowed* (which in the present case he did not do until August 12), this Court held, just as has been held below in this case, that there had not yet been any final award or decision by the Commissioner.

After reciting the certificate of the Commissioner:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.
>
> A. Pleasonton, Commissioner."

and pointing out that under the same Section 3220 R. S. (under which the Commissioner still acts) it "may be conceded that the power of final decision is in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury," but that it is very reasonable "that the chief financial officer of the government shall be heard by the Commissioner before a final decision is made," the opinion of this Court continues (italics ours):

> "The schedule purports to be transmited to the Secretary for consideration and advisement, in accordance with the regulations. The certificate made to the

Secretary repeats the statement. Read in the light of the seventh regulation, it is as though the Commissioner said: 'I have examined this claim, and think it should be allowed, but before final decision I await your consideration and advisement.' *Certainly, if the Commissioner was awaiting for such consideration and advisement, he was not making or intending to make a final decision.* Not only is this the plain import of the language of the schedule, but the further fact that the Commissioner did not comply with either the third, fourth, or fifth regulations emphasizes the correctness of such construction. *He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back;* no entry of a decision appears in any docket; *and no list, including this award, was ever transmitted by him to the First Comptroller of the Treasury;* and the fifth regulation, surely, is within the competency of the Secretary of the Treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, *make it perfectly clear that no final determination was made* or intended *by Commissioner Pleasonton.* Therefore, *the matter was one still pending until the action of Commissioner Douglas, on November 9, 1871, rejecting the claim.*"

This decision in itself is so closely in point that it is absolutely controlling in the present case. Here in the same way the Commissioner from May 19 to August 12 was waiting for advice from the Collector and the Deputy Commissioner, and did not, and in fact could not under the regulation, until so advised on August 12 make or transmit any formal certificate of the amount which should be paid back, and it must be concluded, in words similar to the concluding words of the Court, that the matter was one still pending at all times prior to the action of the Commissioner on August 12, 1924.

To the same general effect, that a refund is not allowed prior to the determination of the amount to be refunded, is a well established line of decisions of this Court which hold that an allowance by the Commissioner of Internal Revenue for the refund of a tax illegally collected is not

the simple passing of an ordinary claim by an ordinary accounting officer but an award upon which an action may be brought, and which is conclusive unless impeached for fraud or mistake:

United States v. Kaufman, 96 U. S. 567;
United States v. Savings Bank, 104 U. S. 728;
Louisville v. United States, 169 U. S. 249.

III. From start to finish in this case the petitioner's position has been totally without merit in fact or in law, and his every effort has been to defeat the plain intent of Congress.

The Commissioner's whole effort has been, by one technical objection after another, to stop the running of interest at the earliest possible date and as many months as possible before the actual payment of the refund. He has persistently sought thus to defeat the legislative intent in the face not merely of the provisions of Section 1019, which we believe do not permit his construction, but also of the purpose of Congress so definitely expressed in the reports of both of the Committees which drafted that section, viz., that (italics ours):

> "If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest *during the period of their retention;* and the fact of protest or a claim does not affect the merits of such an interest payment."—68th Congress, 1st Session, House Report No. 179, p. 72; Senate Report No. 398, p. 46, paragraph 3.

Since this statute, which allows compensation to a taxpayer for the loss of the use of his money while illegally retained by the Government, is obviously a remedial statute it should be construed to effectuate rather than to defeat the purpose of Congress. *Logan v. Davis*, 233 U. S. 628.

It is quite true, as stated by the petitioner at page 14 of his brief, that the general rule is that interest is not to be allowed against the Government except where there is an

express agreement to pay or statutory authority therefor. But that rule has no bearing on a case where, as here, Congress has seen fit to enact express legislation providing for the payment by the Government of interest on the large amount of moneys erroneously collected and refunded by it under the income tax laws.

It is common knowledge that the Government under the new forms of income taxes enacted during the war illegally exacted large sums from taxpayers before these new laws were fully construed by Commissioner and the courts, and also that taxpayers in many instances in ignorance of their rights under the complicated laws and regulations voluntarily overpaid their taxes. In the Revenue Act of 1921 Congress recognized that since the Government had had the use of money rightfully belonging to the taxpayer and the taxpayer had been deprived of its use it was only fair that interest should be paid as compensation to the taxpayer, and in that act for the first time provided that interest should be paid subject to several important limitations. In the Revenue Act of 1924, however, Congress gave full recognition to the moral obligation of the government to pay interest, and provided that interest should be paid on all refunds, regardless of whether or not a claim had been filed by the taxpayer, and in every case for the entire period from the date of the original overpayment of tax to that of the allowance of the refund.

In the face of the plain terms of Section 1019 of the Revenue Act of 1924, and of the conditions which brought about its enactment and the unanimous expression as to its purpose embodied in the report of the committees of both houses of Congress, it is not for the Commissioner or any other administrative officer to seek to defeat the purpose of Congress that taxpayers should be compensated by interest on moneys improperly held by the Government "during the period of their retention" and to attempt to stop the interest months before the end of that period.

In concluding the discussion of the case from a technical or legal standpoint it seems proper also to thus bear in mind that the Commissioner's position is totally without merit from an equitable or just standpoint, is contrary to the spirit and purpose of the statute, and is incompatible with any presumption that Congress has sought to deal fairly with taxpayers by paying for benefits received at their expense and compensating them for the illegal retention of their money for long periods.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be denied.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

September, 1925.